

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MICHAEL J. KRIZ,

Petitioner,

vs.

12th JUDICIAL DISTRICT BOARD OF
MENTAL HEALTH OF BOX BUTTE
COUNTY, et al.,

Respondents.

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4:05cv3255

ORDER on INITIAL REVIEW

This matter is before the court for initial review of the Petition for Writ of Habeas Corpus filed by the petitioner, Michael J. Kriz, who is in the custody of the Lincoln Regional Center pursuant to a judgment that he is mentally ill and dangerous. Read in conjunction with his companion civil rights case, No. 4:05cv3254, it appears that after Mr. Kriz served a prison sentence as a sex offender, the County Attorney of Box Butte County, Nebraska initiated an involuntary mental health commitment of the petitioner before the Box Butte County Mental Health Board. The petitioner states that he is not mentally ill and that he is not dangerous. Nevertheless, he has been "warehoused" at the Regional Center since October 20, 1992. Therefore, he seeks release from custody or at least treatment in a less restrictive environment, e.g., on an outpatient basis.

28 U.S.C. § 2254 affords habeas corpus relief to "a person in custody pursuant to the judgment of a State court [who] is in custody in violation of the Constitution or laws ... of the United States." *Id.* § 2254(a). Rule 4 of the *Rules Governing Section 2254 proceedings in the United States District Courts*, as amended effective December 1, 2004, states:

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

This case has been assigned to Senior District Judge Lyle E. Strom. However, a Magistrate Judge may conduct initial review. Rule 10 of the *2254 Rules*, as amended, states: "A magistrate judge may perform the duties of a district judge under these rules,

as authorized under 28 U.S.C. § 636.” On initial review of the petition, I provisionally find that summary dismissal under Rule 4 of the § 2254 *Rules* is not required and that the respondent shall answer or otherwise respond to the § 2254 petition.

THEREFORE IT IS ORDERED:

1. That the Clerk of Court shall mail copies of the petition to the named respondent, to the Nebraska Attorney General, to the Warden of the Lincoln Regional Center, and to the Public Defender of Box Butte County by regular first-class mail;

2. That, by November 1, 2005, the respondent shall file an Answer to the § 2254 petition on the merits of the claims and any affirmative defenses, in the manner contemplated by Rule 5 of the *Rules Governing Section 2254 proceedings in the United States District Courts*, as amended effective December 1, 2004, or the respondent may, in his discretion, limit the response to affirmative defense(s) by filing a motion for summary judgment pursuant to Fed. R. Civ. P. 56(b), which states:

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof;

3. That, whether the respondent files an answer or a motion for summary judgment, the respondent shall also file with the court and serve on the petitioner a pleading entitled Designation of Relevant State Court Records;

4. That all records listed in the respondent's Designation of Relevant State Court Records shall be filed with the court at the time the Designation of Relevant State Court Records is filed;

5. That if the respondent elects to file a motion for summary judgment, copies of all records designated and filed in support of the motion shall also be served on the petitioner and upon the Public Defender of Box Butte County; and

6. That, whether the respondent files an answer or a motion for summary judgment, the petitioner may reply within 30 days thereafter.

DATED this 3rd day of October, 2005.

BY THE COURT:

s/ F. A. GOSSETT
United States Magistrate Judge